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In the Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Missouri offense of second degree burglary is a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e).

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2 W. LaFave & A. Scott, *Substantive Criminal Law* (1986) 12
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OPINION BELOW

The opinion of the court of appeals (J.A. 33-45) is reported at 864 F.2d 625.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing was denied on March 7, 1989. J.A. 46. The petition for a writ of certiorari was filed on May 6, 1989, and granted on October 10, 1989. J.A. 47. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 922(g), provides in pertinent part:

It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The 1986 version of 18 U.S.C. 924 (1982 & Supp. V 1987),[1] provides in pertinent part:

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

(2) As used in this section—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—

[1] The 1986 version of Section 924 applies to petitioner's offense. Congress has since amended 18 U.S.C. 924(e)(1) in a manner not material to this case. In the Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402, Congress amended Section 924(e)(1) to provide that the enhanced sentence applies to otherwise qualified felons who have "three previous convictions * * * [for offenses] committed on occasions different from one another."

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

1. Petitioner was indicted in the Eastern District of Missouri on three counts of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 2-5. In the district court, the government filed a pretrial "Notice of Punishment Enhancement," which stated that since petitioner's criminal record included two previous convictions for second degree burglary under Missouri law,[2] one previous state conviction for robbery, and

[2] In September 1963 and in October 1971, petitioner was convicted of second degree burglary in the Missouri state courts. See J.A. 26-27, 30-31. At the time he committed those crimes, second degree burglary in Missouri consisted of several distinct offenses, but generally involved unlawful entry into a building with the intent to commit a crime. See Mo. Rev. Stat. §§ 560.045, 560.050, 560.055, 560.060, 560.070, 560.075, 560.080 (1969) (repealed 1979), *reprinted at* Appendix to Pet. Br. 3a-5a. Petitioner conceded that his two convictions involved entries into buildings. The first was a burglary of a service station at night when the station was closed; the second was an entry into, and theft of items from, the home of a girlfriend of petititioner's accomplice. J.A. 11. See also Pet. Br. 6-7 n.1.

In 1979, Missouri repealed the separate definitions of second degree burglary. Missouri law currently defines that offense as "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170 (1986), *reprinted at* Pet. Br. App. 3a.

two previous state convictions for assault, he was subject to an enhanced sentence under 18 U.S.C. 924 (e)(1) (Supp. V 1987). J.A. 6-7.

Petitioner pleaded guilty to one of the three counts in the indictment. At the sentencing hearing, petitioner contended that his burglary convictions were not proper predicate offenses under Section 924(e)(1), because those crimes did not involve actual or potential injury to others. J.A. 8-12, 19.[3] The district court rejected that argument and sentenced petitioner to an enhanced term of 15 years' imprisonment under Section 924(e)(1). J.A. 13-21, 22-25.

2. The court of appeals affirmed. J.A. 33-45. In the court of appeals, petitioner argued that Section 924(e) did not apply to his burglary convictions because those offenses did not involve a serious potential risk of physical injury to another. Relying on its recent decision in *United States* v. *Portwood*, 857 F.2d 1221 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989), the court of appeals held that Congress's use of the term "burglary" in Section 924(e)(2)(B)(ii) means " 'burglary' however a state chooses to define it." J.A. 36. As the court explained, "[a] person with . . . prior convictions for burglary, regardless of the details of each burglary, presents

[3] At the sentencing hearing, the government agreed with petitioner that the district court should not consider one of the two assault convictions in applying the enhancement provision since that conviction had not been verified. J.A. 14, 17-18. Petitioner did not challenge the characterization of his remaining assault and robbery convictions as "violent felonies." See 18 U.S.C. 924(e)(2)(B)(i); J.A. 8-9, 18-19. Petitioner is therefore subject to an enhanced sentence if either one of his second-degree burglary convictions qualifies as a conviction for "burglary" within the meaning of Section 924(e)(2)(B)(ii).

the type of potential threat to society that Congress sought to control by the enactment of § 924(e)." J.A. 36 (quoting *Portwood*, 857 F.2d at 1224). Consequently, the court held, "Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons." J.A. 36 (quoting *Portwood*, 857 F.2d at 1224).

Judge Bright dissented. J.A. 36-45. In his view, since Congress did not define the term "burglary" in Section 924(e), it must have intended to adopt the common law definition, *i.e.*, "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." J.A. 37. Since Judge Bright found that petitioner's burglary convictions did not fall within this common law definition and did not otherwise "involve[] conduct that presents a serious potential risk of physical injury to another" (18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987)), he concluded that petitioner should not have been subjected to the enhancement provision of Section 924(e). J.A. 43-45.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Armed Career Criminal Act of 1984 established an enhanced penalty for anyone who illegally possessed a firearm and had three previous convictions for robbery or burglary. Pub. L. No. 98-473, Title II, §§ 1801-1803, 98 Stat. 2185, codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984). The terms "burglary" and "robbery" were specifically defined in the statute. The definitions that Congress

adopted were the generic definitions of those crimes —the definitions used by an overwhelming majority of modern jurisdictions. "Burglary" was defined in the statute as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense."

In 1986, Congress expanded the category of predicate crimes that would result in enhanced penalties for firearms offenses. With the enactment of the Career Criminals Amendment Act of 1986, Congress provided enhanced penalties for any firearms offender with three previous convictions of a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100 Stat. 3207-39 to 3207-40, codified at 18 U.S.C. 924(e) (Supp. V 1987). The term "violent felony" was defined to include (i) any felony that has as an element the use or threat of use of force against another, and (ii) burglary, arson, extortion, crimes involving the use of explosives, or any other felony involving conduct that presents a serious potential risk of physical injury to another. Unlike the 1984 statute, the 1986 statute did not define the term "burglary." The definition in the 1984 statute was omitted from the 1986 amendment, apparently as a result of inadvertence.

Congress's unexplained failure to define burglary in the 1986 statute has resulted in confusion. Under the 1984 Act, petitioner clearly would have been subject to an enhanced sentence, since his two burglaries fell within the express definition of burglary in that statute. Because of the absence of a separate definition of burglary in the 1986 Act, however, the courts have had difficulty determining whether burglaries such as petitioner's are covered by that statute.

In this case, the Eighth Circuit held that a prior state court conviction is a conviction for "burglary" within the meaning of Section 924(e) if the State calls the offense burglary, but not otherwise. The Fifth Circuit has adopted the same view. See, *e.g.*, *United States* v. *Leonard*, 868 F.2d 1393 (5th Cir. 1989), cert. pending, No. 88-1885. Thus, the court of appeals held that because petitioner's Missouri offenses were labeled as burglaries under Missouri law, they constituted burglaries for purposes of Section 924(e)(2)(B)(ii).

The Fourth and Ninth Circuits have taken a much narrower approach. Those two courts have concluded that because Congress failed to define the term "burglary" in the 1986 statute, that term must be construed to include only those crimes that would have been considered burglaries at common law, *i.e.*, the breaking and entering of a dwelling at night with the intent to commit a felony within. See, *e.g.*, *United States* v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988); *United States* v. *Chatman*, 869 F.2d 525 (9th Cir. 1989).

The Third, Sixth, Seventh, and Eleventh Circuits have taken a third view—the one we believe is correct. Those courts have held that the modern, generic definition of burglary, which was contained in the 1984 Act, should also be applied to prosecutions under the 1986 version of the statute. See, *e.g.*, *United States* v. *Palmer*, 871 F.2d 1202 (3d Cir.), cert. denied, 110 S. Ct. 233 (1989); *United States* v. *Taylor*, 882 F.2d 1018 (6th Cir. 1989), cert. pending, No. 89-5962; *United States* v. *Dombrowski*, 877 F.2d 520 (7th Cir. 1989), cert. pending, No. 89-5282; *United States* v. *Hill*, 863 F.2d 1575 (11th Cir. 1989). Because Congress intended to extend the Armed Career

Criminal Act's coverage, and not in any way to restrict its application, those courts have held that any conduct that would have constituted burglary under the 1984 statute still constitutes burglary under the Act as amended.[4]

1. For two reasons, the modern definition of burglary, which Congress expressly incorporated in the 1984 statute, is the proper definition of the term "burglary" in the 1986 statute. First, when Congress employs a term without defining it, it is assumed that Congress intends the term to have its ordinary contemporary meaning. Only five States still embrace the narrow common law definition of burglary. The common law definition has been almost entirely replaced by modern statutes, which define burglary, with only minor variations, as the entry (in day or night) of a building (whether a dwelling or otherwise) with intent to commit a crime (not necessarily a felony). Forty-one of the 50 States have adopted this generic definition of the term, and Congress itself has used that definition in several modern statutes. Absent some indication to the contrary, it is unreasonable to attribute to Congress an intent to adopt the arcane common law definition of burglary rather than the prevailing modern definition.

[4] The First Circuit has declined to adopt any of those competing constructions. See *United States* v. *Patterson*, 882 F.2d 595 (1st Cir. 1989), cert. pending, No. 89-5881. Having determined that it "frankly cannot divine how Congress intended to define burglary" in the 1986 version of the Armed Career Criminal Act, the First Circuit refused to hold that a defendant's convictions for "breaking and entering" under Massachusetts law constituted "burglary" within the meaning of Section 924(e)(2)(B)(ii). Nonetheless, the court held that the defendant was subject to an enhanced sentence, because his conduct fell within the catch-all phrase of that section, which defines a "violent felony" to include any "conduct that presents a serious potential risk of physical injury to another." 882 F.2d at 604.

Second, the modern definition of burglary is the definition that Congress used in the 1984 statute, and neither the language nor the purpose of the 1986 Act suggests that Congress wished to narrow that definition in 1986. To the contrary, the available evidence indicates that Congress intended the 1986 amendment to expand, not contract, the category of predicate offenses and to reach burglaries to the same extent as the 1984 statute.

2. At the same time, we do not believe that Congress in 1986 meant to include within the definition of "burglary" anything that a State chose to call "burglary" and to exclude anything the State chose not to call "burglary." While such a scheme would have the advantage of simplicity, it would produce anomalies that, we submit, Congress could not have intended. Everything would turn on nomenclature: a conviction in one State that chose to apply the term burglary very broadly to a variety of property offenses would be a predicate crime under the Armed Career Criminal Act, while the same conduct in other States, which used the term more restrictively, would not. Absent any indication that Congress intended to abandon the sensible generic definition in the 1984 statute in favor of a definition turning on statutory labels, it is erroneous to rely entirely on the label attached to the offense by the State of conviction.

3. There is no support in the language or legislative history of the 1986 Act for petitioner's proposed construction—that "burglary" within the meaning of

the 1986 statute includes only those burglary offenses that have as an element conduct that presents a serious risk of physical injury to others. The 1986 statute lists as predicate offenses certain specific crimes, including burglary, and it also contains a catch-all clause that includes any crime that "involves conduct that presents a serious potential risk of physical injury to another." If Congress had intended burglary to be a predicate offense only when it involved conduct presenting a demonstrable risk of physical injury, there obviously would have been no need to list the offense of burglary separately. Congress could have relied on the catch-all clause that includes all felonies involving a serious risk of physical harm.

The legislative history of the 1986 statute makes it clear that the specific inclusion of burglary, along with arson, extortion, and explosives offenses, was not accidental. The House bill would have included those offenses only if they were shown to involve a serious risk of physical harm—essentially the construction petitioner urges upon the Court here. The Senate bill, by contrast, would have included all burglaries as well as all other crimes involving a serious risk of injury to persons *or property*. The compromise bill, which was enacted, designated four specific property crimes, including burglary, as well as any crimes involving a risk of injury to persons. The legislative background makes clear that Congress intended precisely what the language of the statute denotes—that "violent felony" was meant to include all felonies involving violence to persons, and four specific felonies, including burglary, that primarily involve violence against property. The court of appeals therefore properly considered petitioner's two convictions for second-degree burglary in determining that he should be sentenced under the enhanced sentencing provision of the Armed Career Criminal Act.

ARGUMENT

"BURGLARY" UNDER SECTION 924(e)(1) INCLUDES ANY UNLAWFUL ENTRY INTO A BUILDING FOR THE PURPOSE OF COMMITTING A CRIME

A. The Term "Burglary" In Section 924(e) Is Not Restricted To Its Common Law Definition

The Armed Career Criminal Act, as amended in 1986, provides that a previously convicted felon who possesses or receives a firearm, and who "has three previous convictions * * * for a violent felony or a serious drug offense, or both, * * * shall be * * * imprisoned not less than fifteen years * * *" 18 U.S.C. 924(e)(1) (Supp. V 1987). The statute then defines the term "violent felony" to include, among other offenses, any felony that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987). The statute does not define the term "burglary." Contrary to petitioner's suggestion (Br. 12-14), however, that omission does not render Congress's use of the term superfluous.

1. As this Court has recognized, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); see also *John Doe Agency* v. *John Doe Corp.*, No. 88-1083 (Dec. 11, 1989), slip op. 7-8. Under its ordi-

nary, contemporary definition, the term "burglary" means the unlawful entry of a building with the intent to commit a crime inside. See, *e.g.*, ALI, *Model Penal Code* § 221.1 (1985) ("A person is guilty of burglary if he enters a building or occupied structure * * * with purpose to commit a crime therein * * *."); National Commission on Reform of Federal Criminal Laws, *Final Report* § 1711 (1971) ("A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure * * * with intent to commit a crime therein."). As leading commentators have noted, "modern statutory definitions of the crime [of burglary] * * * encompass entry at all times of all kinds of structures." W. LaFave & A. Scott, *Handbook on Criminal Law* § 96, at 708 (1972); see also R. Perkins & R. Boyce, *Criminal Law* 270 (1982). In other words, although statutes "vary from state to state, * * * the essence of the offense remains the same: an intrusion into a structure with the intent to commit a crime therein." 3 C. Torcia, *Wharton's Criminal Law* § 342, at 235 (14th ed. 1980).

The common law definition of burglary was significantly narrower than the accepted modern definition. At common law, burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13, at 464 (1986). The modern definition of burglary, however, has departed from the common law definition in four important respects: it does not require a "breaking"; it does not require that the building entered be a dwelling house; it does not require that the entry be made at nighttime; and it does not require that the object offense be a felony.

ALI, *Model Penal Code and Commentaries, Part II* § 221.1, at 61 (1980).

Two circuits have held that the term "burglary" in the 1986 version of the Armed Career Criminal Act must be assigned its common law meaning, since Congress did not specifically define the term. See *United States* v. *Chatman*, 869 F.2d 525 (9th Cir. 1989); *United States* v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988); see also J.A. 36-45 (Bright, J., dissenting). Petitioner, however, does not vigorously press that argument; in fact, he expresses "doubts that Congress intended the common law meaning of burglary to control the definition of 'violent felony' in the enhancement statute." Pet. Br. 30 n.8. Nonetheless, he argues that "use of the common law definition is preferable to that employed by the Eighth Circuit and to the standard urged by the Government." *Ibid.*; Pet. Br. 33 n.9.

The Court has observed that when Congress fails to define a term, it is presumed to intend the term to be given its common law meaning. See, *e.g.*, *United States* v. *Turley*, 352 U.S. 407, 411 (1957); *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952). That proposition, however, is an application of the more general principle that Congress ordinarily intends undefined terms to have their conventional, accepted meaning. See *Morrissette*, 342 U.S. at 263 ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Where the common law definition of a term has remained the conventional interpretation, that definition is naturally presumed to be the one Congress

intended. But the common law definition does not ordinarily apply where "the present common understanding of the word departs largely from the technical meaning it had at the old common law." *Reagan* v. *United States*, 157 U.S. 301, 302 (1895) (refusing to adopt the common law definition of the term "felony"). When a term has evolved beyond its common law meaning, as is the case with the term "burglary," [5] the Court has applied the "ordinary, contemporary, common meaning" of the term, not the antiquated formulation from early common law. See *Perrin* v. *United States*, 444 U.S. at 42 ("bribery" under the Travel Act, 18 U.S.C. 1952, is not confined to the common law definition); *United States* v. *Nardello*, 393 U.S. 286 (1969) ("extortion" under the Travel Act is defined according to its contemporary understanding, not according to the restrictive common law definition). Thus, in concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the [statute's] coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. *United States*, 462 U.S. 356, 362 (1983).

The same analysis applies here. The common law definition of burglary has almost completely disappeared from modern statute books. Only the States adhere to the common law definition,[6] which even petitioner acknowledges is "anachronistic." Pet. Br. 30 n.8. In its place, the States have adopted a statutory formula similar to that of the Model Penal Code—the unlawful entry of a building with intent to commit a crime inside. That formulation, with

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[5] As one commentator noted a generation ago, "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. Pa. L. Rev. 411, 411 (1951).

[6] Those States are Maryland, Massachusetts, North Carolina, Rhode Island, and West Virginia. Even among those States, the Maryland, North Carolina, and West Virginia statutes depart somewhat from the common law formulation, and Rhode Island retains the common law formulation as a matter of court decision, not statutory definition. See Md. Ann. Code art. 27, § 30(a) (1987) (burglary defined according to common law, except that the object offense may include the theft of goods of any value); N.C. Gen. Stat. § 14-51 (1986 & Supp. 1988) (object offense may include larceny regardless of value of property in question; building is covered even if not a "dwelling house," as long as it contains at least one room used as a sleeping apartment); R.I. Gen. Laws § 11-8-1 (1981) (burglary undefined in statute; construed as adopting the common law meaning, see *State* v. *O'Rourke*, 121 R.I. 434, 399 A.2d 1237 (1979); W. Va. Code § 61-3-11 (1984) (breaking and entering into dwelling house is burglary even if committed during daytime). Thus, only one State—Massachusetts—has enacted a statute that fully accords with the common law definition of burglary. Mass. Ann. Laws ch. 266, § 14 (Law. Co-op. 1980 & Supp. 1989). Although the court of appeals in *United States* v. *Hill*, 863 F.2d 1575, 1582 n.5 (11th Cir. 1989), counted Virginia among the States that have retained the common law formulation. Virginia does not limit burglary in that fashion. Virginia includes within the definition of "statutory burglary" a daytime or nighttime entry into any "office, shop, storehouse, warehouse, banking house, or other house" with intent to commit larceny or any felony. Va. Code Ann. §§ 18.2-90, 18.2-91 (1988).

minor variations, is followed in more than 80 percent of the States.[7]

When Congress drafted the Armed Career Criminal Act of 1984 and amended that Act two years later, it was plainly aware of the prevailing modern definition of the term, since it specifically adopted that definition in the 1984 statute. In that statute, Congress defined "burglary" to mean "entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." That definition is almost precisely the same as the Model Penal Code definition, and it is similar to the definition used in most state penal codes.[8] Even if the 1984

[7] The Missouri second-degree burglary statute, see note 2, *supra*, is quite typical. It defines second-degree burglary as entering unlawfully or knowingly remaining unlawfully in a building or inhabitable structure for the purpose of committing a crime therein. Mo. Rev. Stat. § 569.170 (1986). While some States have broader statutes, 41 States include within the definition of "burglary" any illegal entry into a building for the purpose of committing either any criminal offense or certain criminal offenses, especially theft. The remaining nine States include the five States that use some variant of the common law definition and four others with unusual statutory provisions. Michigan does not have any general statutory crime denominated burglary, but it reaches the contemporary offense of burglary under the rubric of breaking and entering. Mich. Comp. Laws Ann. § 750.110 (West 1968 & Supp. 1989). Arkansas, Montana, and Ohio all limit burglaries to entries into "occupied" or "occupiable" structures, although Arkansas and Montana define the limiting term so broadly that it includes any building where business is, or could be, transacted. See Ark. Stat. Ann. §§ 5-39-101(1), 5-39-201 (1987); Mont. Code Ann. §§ 45-2-101(40), 45-6-204(1) (1988); Ohio Rev. Code Ann. §§ 2909.01, 2911.12 (Anderson 1987).

[8] That definition is also similar to the definition that Congress has used in two other burglary statutes. In 1984, Congress enacted a prohibition against "burglaries involving controlled substances," which prohibited persons from entering or remaining in "the business premises or property" of a person registered to dispense controlled substances for the purpose of stealing drugs. 18 U.S.C. 2118(b). Two decades earlier, Congress enacted a second-degree burglary statute for the District of Columbia, which reached entries, during day or night, into any building, whether occupied or not, with intent to commit any criminal offense. Act of Dec. 27, 1967, Pub. L. No. 90-226, Tit. VI, § 602, 81 Stat. 736, codified at D.C. Code Ann. § 22-1801 (1981).

It is true that in the Uniform Code of Military Justice (UCMJ) Congress adopted the common law definition of burglary. See 10 U.S.C. 929. But the burglary provision of the UCMJ has not been substantively amended since 1950, and even then the provision was largely a codification of the crimes already found in military law. Prior to enactment of the UCMJ, burglary was defined in military law according to the common law formulation. See J. Appleton, *Military Law for the Company Commander* 75 (1944). The use of the common law formulation in the UCMJ therefore provides no support for the view that when Congress uses the term "burglary," it intends to adopt the common law formulation. Similarly, burglary is defined according to the common law meaning in 18 U.S.C. 3185(8), but the pertinent language of that little-used statute, which governs the extradition of fugitives to countries occupied by the United States, was enacted at the time of the Spanish-American war and has not been amended since. See Act of June 6, 1900, ch. 793, 31 Stat. 656.

statute had not defined the term "burglary," it would be natural to assume that the contemporary, generic definition of burglary is the one Congress intended. That assumption is particularly powerful in this context since Congress expressly adopted the generic definition in the Armed Career Criminal Act of 1984 and, as we show below, gave no indication in the 1986 amendments of an intent to replace the generic definition with a more restrictive one. It is therefore

sensible to apply the 1984 definition to the term as used in the 1986 version of the statute, even though Congress failed to reenact the definitional section from the 1984 Act.

2. The legislative history of the Career Criminals Amendment Act of 1986 supports the conclusion that Congress intended that statute to carry forward the generic definition of burglary expressly set forth in the Armed Career Criminal Act of 1984.

In the early 1980s, Congress made several efforts to pass legislation directed at career criminal offenders. Those legislative proposals were based on the recognition that career offenders commit a grossly disproportionate number of crimes. Accordingly, the purpose of the career criminal legislation was to provide stringent federal penalties for such recidivist offenders. As Senator Specter, the principal Senate sponsor of the legislation, explained:

> [A] surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country. The statistic is startling, but the implication is evident: by targeting our resources on this six percent we can dramatically reduce crime.

Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 17 (1984).

The first predecessor of the bill that ultimately became the Armed Career Criminal Act of 1984 was introduced in the Senate in 1981. That bill focused on robbery and burglary, the two principal offenses committed by career criminals. See S. Rep. No. 585,

97th Cong., 2d Sess. (1982). Although that bill passed both Houses in 1982, it was included as part of a larger anti-crime package that was pocket-vetoed by the President.

In the next Congress, Senator Specter again introduced a bill to combat career criminals; once again, the bill focused on the crimes of robbery and burglary. Introducing the bill, Senator Specter explained that robberies and burglaries

> occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. * * * Burglaries involve invasion of [innocent individuals'] homes or workplaces, violations of their privacy, and loss of their most personal and valued possessions. * * * Most robberies and burglaries are committed by career criminals * * * [who] often have no lawful employment; their fulltime occupation is crime for profit and many commit crimes on a daily basis. * * * Various studies also indicate that for every time a career criminal is arrested for robbery or burglary, he has probably committed 10 to 20 such crimes. Career criminals commit robberies and burglaries interchangeably.

129 Cong. Rec. 599 (1983) (remarks of Sen. Specter). As reported by the Senate Judiciary Committee, Senator Specter's bill contained a definition of the term "burglary" that used the language ultimately enacted in the Armed Career Criminal Act of 1984. See S. Rep. No. 190, 98th Cong., 1st Sess. 2 (1983). The definition was inserted in response to suggestions that it was necessary to avoid the risk that the term would be read restrictively and confined to common law burglary. See *Armed Robbery and Burglary Prevention Act: Hearing on H.R. 6386 Before the Subcomm. on Crime of the House Comm.*

on the Judiciary, 97th Cong., 2d Sess. 36 (1982) (testimony of Deputy Assistant Attorney General Roger M. Olsen); *Armed Career Criminal Act of 1983: Hearing on S. 52 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 11, 18, 20 (1983). The Senate Report explained that the definitional section was inserted to avoid the possibility "that culpable offenders might escape punishment on a technicality." S. Rep. No. 190, *supra*, at 20. After noting that the common law definition of burglary included the requirement that the offense be committed "during the nighttime and with respect to a dwelling," the Report observed that "for purposes of this Act, such limitations are not appropriate." *Ibid.* The bill that ultimately became the Armed Career Criminal Act modified Senator Specter's bill in various respects, but retained the definition of burglary that his bill contained. See H.R. Rep. No. 1073, 98th Cong., 2d Sess. (1984).

The background of the 1984 Act thus makes it clear that the sponsors of the Act adverted to the risk that the term "burglary" would be construed narrowly, according to its common law meaning, and that they included the generic modern definition of the term in order to avoid that risk.

In the Career Criminals Amendment Act of 1986, Congress amended the Armed Career Criminal Act by expanding the category of prior convictions that could lead to enhanced penalties. Rather than requiring that the career offender have three or more prior convictions for either burglary or robbery, the new version of the statute provided for an enhanced sentence if the firearms offender had three prior convictions for either a "serious drug offense" or a "violent felony." Pub. L. No. 99-570, §§ 1401-1402, 100

Stat. 3207-39 to 3207-40 (1986).[9] As we have noted, in the course of expanding the category of predicate offenses Congress omitted the definition of "burglary" that had been contained in the 1984 statute. There is absolutely no indication, however, that Congress intended by that omission to abandon the broad, generic definition of burglary in favor of the more restrictive common law definition.

The Career Criminals Amendment Act of 1986 evolved from three separate bills, two from the House of Representatives and one from the Senate. The Senate bill, S. 2312, 99th Cong., 2d Sess. (1986), and its companion bill in the House, H.R. 4639, 99th Cong., 2d Sess. (1986), made a "crime of violence" a predicate for enhanced penalties: those bills defined a "crime of violence" to include crimes against persons or property that were either

> (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

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[9] Congress actually amended the Armed Career Criminal Act twice in 1986. The first amendment, contained in the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-453, 456-459 (1986), recodified former 18 U.S.C. App. 1202 (1982 & Supp. II 1984) as 18 U.S.C. 924(e) (Supp. IV 1986), with only one minor change. See, *e.g.*, *United States* v. *Taylor*, 882 F.2d at 1024; *United States* v. *Headspeth*, 852 F.2d at 757 n.1. Congress retained the generic definition of burglary, consisting of entering and remaining surreptitiously within a building of another to engage in conduct constituting a federal or state offense. The statutory language was changed only by omitting the distinction between felony burglary and those state misdemeanor burglary offenses that were punishable by a prison term of two years or less. The more significant amendment to the Armed Career Criminal Act was the one made several months later by the Career Criminals Amendment Act of 1986.

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Senator Specter, who introduced S. 2312, understood that the bill would "broaden th[e] definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute." *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 44 (1986) (reporting text of H.R. 4639) [*House Hearing*]. On the Senate floor, Senator Specter stated that his bill would "broaden the so-called predicate crimes to include drug violations and certain other serious violent acts. This amendment would change the law by broadening the prior convictions which lead to the classifications of being a 'career criminal.'" 132 Cong. Rec. 7697 (1986).[10]

The Senate hearings on Senator Specter's bill reveal a shared understanding that the bill would expand the scope of the Armed Career Criminal Act. No mention was made of adopting a more restrictive definition of burglary. For example, Representative Wyden, sponsor of the companion House bill, explained that the Act, although successful to date,

[10] Senator Specter entered into the Congressional Record a letter from the Department of Justice, expressing the Department's understanding that the proposed amendment would expand the coverage of the Armed Career Criminal Act beyond (but still including) robbery and burglary. See Letter from Assistant Attorney General John R. Bolton to Senator Arlen Specter (Mar. 18, 1986), *quoted at* 132 Cong. Rec. 7698 (1986).

"would be much more effective if the predicate offenses were extended beyond robbery and burglary to include crimes of violence and serious drug offenses. That's precisely what the bill we recently introduced would do." *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 6 (1986) (reporting text of S. 2312) [*Senate Hearing*]; see *House Hearing* 10. And Deputy Assistant Attorney General Knapp observed that the Senate bill would "expand the coverage of the act" while retaining robbery and burglary as predicate offenses. *Senate Hearing* 9. "The term 'crime of violence' would include robberies and burglaries," he noted, "since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." *Ibid.*[11]

The situation was more complicated in the House of Representatives. In addition to Representative Wyden's bill, H.R. 4639, the House considered H.R. 4768, 99th Cong., 2d Sess. (1986), a bill sponsored by Representatives Hughes and McCollum that also expanded the category of predicate offenses under the Armed Career Criminal Act. Like H.R. 4639, the Hughes/McCollum bill provided that a crime could be a predicate offense for sentence enhancement if it fell

[11] The definition of "crime of violence" in Senator Specter's bill (and the House equivalent) was taken from 18 U.S.C. 16, which clearly includes burglary. See S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) ("offenses such as burglary in violation of a State law" are included, because "such an offense would involve the substantial risk of physical force against another person or against the property").

within one of two broad categories—"violent felony" or "serious drug offense." The Hughes/McCollum bill, however, defined "violent felony" more narrowly than the Senate bill and Representative Wyden's bill; the Hughes/McCollum bill would have limited the definition of "violent felony" to "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." *House Hearing* 6.

By focusing on the element of use of force against persons, the Hughes/McCollum bill would have eliminated burglaries from the class of predicate offenses for sentence enhancement. At the House hearings, the Department of Justice criticized the Hughes/McCollum bill for that omission, and recommended that burglaries be retained as predicate offenses. Deputy Assistant Attorney General Knapp testified that "one of the critical standard categories involve[s] people with a long history of burglary convictions, because in fact your typical career criminal is most likely to be a burglar * * *. That is probably the No. 1 professional crime." *House Hearing* 26. A representative of the National Association of Criminal Defense Lawyers (NACDL) noted that burglaries would be omitted from the Hughes/McCollum bill as introduced, and suggested that if the Committee wished to retain burglaries as predicate offenses, it should do so "simply by retaining 'burglary' in [the statute] rather than by substituting for it the all-inclusive 'crime of violence' definition proposed in [Representative Wyden's bill and the Senate bill]." *House Hearing* 34. The NACDL representative added that his organization had "no problem" with retaining burglary as a predicate offense for enhanced sentencing. *Id.* at 38.[12] Representative Hughes, the Chairman of the House Subcommittee on Crime, responded to the concerns about the status of burglary at the conclusion of the hearings:

> Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included burglaries.
>
> My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon. So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm.

House Hearing 41. The other members of the Subcommittee who were present concurred in that view, and agreed with Representative Hughes's suggestion that they should "develop some language to do that." *Ibid.*

As a result of the hearings, the House Judiciary Committee ultimately reported out a clean bill, H.R. 4885, 99th Cong., 2d Sess. (1986). See H.R. Rep. No. 849, 99th Cong., 2d Sess. 6-7 (1986). H.R. 4885 provided in relevant part:

> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—

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[12] Although Congress ultimately followed precisely the course suggested by the NACDL representative, the NACDL has now taken the position that that the change in the bill did not have the effect that the organization's witness said it would. Br. of NACDL as Amicus Curiae 10.

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. Rep. No. 849, *supra*, at 7. Subsection (B)(ii) presumably is the language the House Subcommittee developed to cover burglary as it was defined in "the existing statute." *House Hearing* 41. See H.R. Rep. No. 849, *supra*, at 3.

In spite of the amendment, the House bill was still subject to the interpretation that burglary would be covered by the amended statute only if the type of burglary in question involved a substantial risk of physical injury to a person. But there was no suggestion in the new House bill, or in the report accompanying it, that the House proposal would restrict burglary to the common law meaning of the term. See H.R. Rep. No. 849, 99th Cong., 2d Sess. (1986).

The House passed the bill in that form. 132 Cong. Rec. H6739 (daily ed. Sept. 11, 1986). The Senate, however, preferred Senator Specter's version of the Career Criminals Amendment Act. That version, which reached offenses presenting a risk of injury to property as well as a risk of injury to persons, would indisputably have reached all burglaries, not just those involving a risk of injury to persons. The Senate passed Senator Specter's version of the bill on September 30, 1986. See 132 Cong. Rec. 27, 252 (1986).

On October 7, a compromise version was presented to the House. 132 Cong. Rec. H9368 (daily ed. Oct. 7, 1986). The compromise bill expressly incorporated the offenses of "burglary, arson, extortion, [and offenses involving] the use of explosives" in addition to the offenses already covered by the House bill. 132 Cong. Rec. H9495 (daily ed. Oct. 8, 1986). Thus, instead of either including all crimes involving risk of injury to property or excluding them all, the compromise bill listed four specific property crimes, including burglary, and also contained a catch-all category for any crime presenting a serious risk of injury to persons. The bill passed both chambers in that form.

In light of the background of the compromise bill, it appears reasonably clear that the bill was designed to preserve the status quo from the 1984 Act with respect to the offense of burglary. Representative Hughes implicitly acknowledged that point when he stated, with respect to the compromise bill, that "[w]e have strengthened the Armed Career Criminal Act by expanding its coverage to drug crimes and violent crimes other than just burglary and robbery." 132 Cong. Rec. H9459 (daily ed. Oct. 8, 1986); see also 132 Cong. Rec. H10,781 (daily ed. Oct. 17, 1986). Certainly, there is no basis in the legislative materials to infer that Congress sought to narrow the definition of burglary used in the 1984 Act and to adopt the common law definition instead. It would have been strongly preferable, needless to say, if the express statutory definition of burglary had been included as part of the compromise bill. In light of the fact that the compromise bill was drafted hastily at the end of the session, however, it is not entirely surprising that the omission of a definitional section would be overlooked.

Congress has recently indicated its awareness of the problems resulting from the omission of the explicit definition of burglary. On October 5, 1989, the Senate passed S. 1711, 101st Cong., 1st Sess. (1989), one provision of which would amend 18 U.S.C. 924 (e). See 135 Cong. Rec. S12,748-12,749, S12,765 (daily ed. Oct. 5, 1989). That amendment expressly reincorporates the generic definition of burglary that was contained in the 1984 Act but omitted from the 1986 amendment. The bill would add the following provision to Section 924(e):

> [T]he term "burglary" means any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.

135 Cong. Rec. S12,804 (daily ed. Oct. 5, 1989). As Senator Biden explained, the amendment "corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacts the original definition which was intended to be broader than common law burglary." 135 Cong. Rec. S12,749 (daily ed. Oct. 5, 1989). That legislation is now pending before the House.

In sum, "the purpose of the 1986 amendments to section 924(e) was to expand the predicate offenses, not restrict them." *United States* v. *Hill*, 863 F.2d 1575, 1581 (11th Cir. 1989). Congress expressed no intention to abandon the generic definition of burglary that was accomplishing the goal of the Armed Career Criminal Act—"to incarcerate repeat offenders, and particularly those found guilty of * * * burglary in the generic form [Congress had] defined." *United States* v. *Palmer*, 871 F.2d 1202, 1205 (3d Cir.), cert. denied, 110 S. Ct. 223 (1989). As this Court has observed in analogous circumstances, "[t]here is nothing in the [amendment's] legislative history to indicate that, in changing the wording of this statute, Congress intended to abandon [its earlier intention]." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218, 2222 (1989). Instead, the legislative record suggests that "Congress intended that any burglary that would have met the definition of burglary under the previous act would fall within the meaning of burglary" under the amended statute. *United States* v. *Hill*, 863 F.2d at 1582; accord *United States* v. *Taylor*, 882 F.2d at 1024-1028; *United States* v. *Dombrowski*, 877 F.2d at 526-530.

B. "Burglary" Under Section 924(e) Does Not Mean Any Offense That The State Labels Burglary

The court below adopted an attractively simple solution to the problem presented by this case. It held that a prior conviction is one for "burglary" whenever the conviction is labeled "burglary" under the law of the State where the conviction was obtained. The Fifth Circuit has adopted the same approach. See *United States* v. *Leonard*, 868 F.2d 1393 (1989), cert. pending, No. 88-1885. While that approach enjoys the advantage of easy application, it could produce anomalous results and appears not to be what Congress had in mind.

From the beginning, Congress intended the Armed Career Criminal Act to impose a uniform federal standard, not to adopt state definitions of crime. Thus, in the 1983 Senate Report, the Senate Judi-

ciary Committee explained that one of the reasons it was adopting an express definition of the terms "burglary" and "robbery" was to ensure "that the same type of conduct is punishable on the Federal level in all cases." S. Rep. No. 190, *supra*, at 20. That statement is consistent with the general rule that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States* v. *Turley*, 352 U.S. at 411.

Applying a federal standard, rather than incorporating as "burglary" anything that a State may call burglary, is consistent with the purposes of the Armed Career Criminal Act. Congress included burglaries within the reach of the Act because it believed that burglary is one of the principal offenses committed by career criminals, and because it is a serious offense that involves a grave intrusion into privacy and property interests, and sometimes a risk of personal injury as well. The offense that has those characteristics is the generic crime of burglary; those characteristics would not necessarily be shared by any offense that a State chooses to label "burglary," no matter how far removed the State's statute may be from the generic burglary offense.[13] See *United States* v. *Taylor*, 882 F.2d at 1028.

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[13] In response to that objection, the Fifth Circuit has pointed out that burglary statutes do not vary that much among the States and that there are not likely to be many cases in which crimes bearing little resemblance to the generic offense of burglary will be labeled "burglary" under state law. *United States* v. *Leonard*, 868 F.2d 1397 (1989). That argument amounts to saying that although the "state label" approach may be imprecise, it is not likely to be *very* imprecise. Yet the consistency among state burglary statutes is really a point in favor of using the generic definition of burglary, not a point in favor of using state definitions which, although they vary, do not in most cases vary by a lot.

Moreover, under the Fifth and Eighth Circuit approach, if a State chose not to label a particular offense burglary, that would disqualify the offense from being a predicate offense of "burglary" under the Career Criminals Amendment Act, even if the offense would be considered burglary in every other State. That case is not hypothetical. For example, the State of Michigan has no general offense entitled "burglary."[14] It classifies generic burglary as one of several graded forms of "breaking and entering." Under the interpretation of Section 924(e)(2)(B)(ii) that we propose, a conviction in Michigan for entering a building unlawfully for the purpose of committing a crime would count as a predicate offense under Section 924(e), because it would constitute burglary under the generic definition of the crime. Under the interpretation adopted by the Fifth and Eighth Circuits, on the other hand, no violation of the Michigan "breaking and entering" statute would be regarded as "burglary" within the meaning of Section 924(e)(2)(B)(ii), since that offense is not denominated as "burglary" under Michigan law. Under that approach, even if the defendant had five prior convictions for conduct that every other State would consider burglary, he would not be deemed to have been convicted of any burglaries at all within the meaning of Section 924(e) if

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[14] The only section of the Michigan Penal Code that even uses the term "burglary" is a very narrow prohibition against "burglary with explosives." Mich. Comp. Laws Ann. § 750.112 (West 1968 & Supp. 1989).

he were lucky enough to have been convicted all five times in Michigan. That, we submit, is not a rational way to administer the statute and could not have been the result that Congress intended.

Even if there were more to be said for the Fifth and Eighth Circuit position in the abstract, that position is particularly difficult to accept in light of the legislative background of the Career Criminals Amendment Act. As we have noted, Congress adopted a single federal definition of burglary in the 1984 Act, and there is no indication in the legislative record leading up to the 1986 amendments that Congress wished to abandon reliance on a uniform federal standard in favor of a definition that would turn entirely on each State's law. It is highly unlikely that Congress would have endorsed such a radical change in its approach to the enhancement provisions of the Armed Career Criminal Act without leaving any evidence whatsoever of its intention to do so.

C. "Burglary" Under Section 924(e) Is Not Limited To Burglaries That Can Be Shown To Involve A High Risk Of Physical Injury To Persons

Petitioner contends (Br. 15-19, 23-35) that a burglary is not within the definition of "burglary" in Section 924(e) unless it has "as an element necessary for conviction conduct that presents a serious risk of physical injury to another." Br. 35.

1. That argument is foreclosed by the language of the statute. Section 924(e)(2)(B)(ii) defines any "burglary" as a "violent felony" for purposes of the enhancement provision of Section 924(e)(1), and it also includes other crimes that "involve[] conduct that presents a serious risk of physical injury to

another." If, as petitioner suggests, Congress had intended to include only crimes that contain as an element conduct that presents a serious risk of injury to others, it would have used language of that sort in the statute, or it would have expressly modified the reference to burglary, arson, and extortion offenses by excluding any subclass of those offenses that did not involve conduct presenting a serious risk of physical injury to others. The statute provides, however, that a "violent felony" is any felony that *either* "is burglary, arson, or extortion * * * *or* otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987) (emphasis added). Under that language, it is enough that the offense is burglary; no specific connection with violence need be established.

By analogy, the crime of extortion may be committed without any threat or risk of physical injury, yet the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii). The same is true of burglary. If petitioner's construction of Section 924(e) were adopted, the specific statutory reference to burglary, arson, and extortion would serve no purpose, since those terms would be fully comprehended within the catch-all category of felonies that "involve[] conduct that presents a serious potential risk of physical injury to another."

No court of appeals has adopted the interpretation that petitioner advocates. Although the courts have taken several different tacks in seeking to ascertain the proper definition of the term "burglary," none has held that a "burglary" offense under Section

924(e)(2)(B)(ii) must contain as an element conduct that presents a serious potential risk of physical injury to another. In *United States* v. *Dickerson*, 857 F.2d 414 (7th Cir. 1988), cert. denied, 109 S. Ct. 1753 (1989), the Seventh Circuit found the language of the statute sufficiently clear to establish that all burglaries satisfy the prerequisites of Section 924. As that court explained, "if Congress intended to include only crimes in which serious physical injury was involved, it would have worded the statute to say "burglary, arson, or extortion, *and* involves use of explosives or otherwise involves conduct that presents a serious risk of physical injury to another." 857 F.2d at 419; see also *United States* v. *Dombrowski*, 877 F.2d at 527-528.

Some courts have analyzed the same issue slightly differently, but have arrived at the same conclusion: that all burglaries are "violent felonies" within the meaning of the 1986 Act. Those courts have read Section 924(e)(2)(B)(ii) as a conclusive determination by Congress that burglary, arson, extortion, and explosives offenses involve the risk of injury to persons, even though they are principally property crimes. See *United States* v. *Palmer*, 871 F.2d at 1208-1209; *United States* v. *Leonard*, 868 F.2d at 1395; *United States* v. *Portwood*, 857 F.2d at 1224. That approach finds support in the use of the term "otherwise" in Section 924(e)(2)(B)(ii): the use of that word at the beginning of the "catch-all" clause suggests that the four specifically identified crimes, including burglary, have already been found to involve conduct that presents a serious potential risk of physical injury to others, and that with the catch-all clause Congress wished to include within the statute's reach any *other* felonies that might also have that attribute.

There is nothing anomalous about referring to "burglary" as a "violent felony," even if the burglary is not conducted at nighttime and is not directed at a dwelling. Generic burglary often involves a risk of violence, since individuals may often be present in homes or commercial establishments when they are burglarized. See *United States* v. *Patterson*, 882 F.2d 595, 604 (1st Cir. 1989), cert. pending, No. 89-5881 ("while burglary may start out as a nonviolent crime, the burglar may resort to violence if someone is on the premises or appears there while the burglary is in process"); *United States* v. *Palmer*, 871 F.2d 1202, 1209 (3d Cir.), cert. denied, 110 S. Ct. 223 (1989) (both residential and commercial burglaries are inherently dangerous); see also *United States* v. *Portwood*, 857 F.2d 1221, 1224 (8th Cir. 1988), cert. denied, 109 S. Ct. 2073 (1989) ("Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons.").

As Deputy Assistant Attorney General Knapp testified in 1986, burglary "is a potentially very dangerous offense," because in the case of either a typical residential burglary or "a professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises. Many crimes of violence do occur in the course of committing a burglary." *House Hearing* 26. It is therefore not surprising that Congress included "burglary" within the category of "violent felonies" without requiring any further showing that the offense of conviction was one that posed a special risk of physical injury to others.

2. The legislative record, which we have reviewed above, supports the conclusion that the 1986 Act does not restrict the definition of "burglary" to those burglaries that can be shown to pose a special risk of physical injury to others. The version of the Hughes/McCollum bill introduced in the House of Representatives following the House hearings on the 1986 legislation was subject to just such an interpretation, because the bill provided that any crime not having physical force against a person as an element could not be a predicate offense for the enhanced sentencing provision unless the crime involved conduct presenting a serious potential risk of physical injury to others. Of course, if all felony burglary offenses are deemed to present a risk of injury to a person, that restriction would be of no importance. The House bill, however, left that matter unclear, and even the House Report did not clarify that point. The House Report explained the Hughes/McCollum bill as follows:

> The other major question involved in these hearings was as to what violent felonies involving physical force against [property] should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 849, *supra*, at 3.

Although there is no written record of the process leading to the compromise bill that ultimately became the Career Criminals Amendment Act, the ambiguous language from the Hughes/McCollum bill did not become law. Instead, as an accommodation between the Senate and House positions, Congress enacted a bill that would not require courts to determine whether burglary is, by nature, a crime that involves a serious risk of injury to persons. Instead, by identifying burglary by name, the bill that was ultimately enacted resolved that question by preempting it. The enacted bill thus rendered it unnecessary for a court, in the case of burglary, to conduct the kind of inquiry that is required in the case of offenses falling within the "catch-all" provision of Section 924(e)(2)(B)(ii).

By arguing that the 1986 Act must be read to require that the crime of conviction have as an element conduct that presents a serious risk of injury to a person, petitioner seeks to construe the Act as if the House bill had been passed, when in fact that bill was displaced by one that specifically addressed, and omitted, the requirement that petitioner would have this Court read into the statute. For the Court now to undo what the compromise bill accomplished would ignore not only the plain language of the statute, but it would also fail to take appropriately into account the legislative process that led to its enactment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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